SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 651

FLORIDA POWER CORPORATION,
Petitioner,

v.

GAINESVILLE UTILITIES DEPARTMENT, CITY OF GAINESVILLE, FLORIDA,
Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF CROSS-PETITIONER FLORIDA POWER CORPORATION

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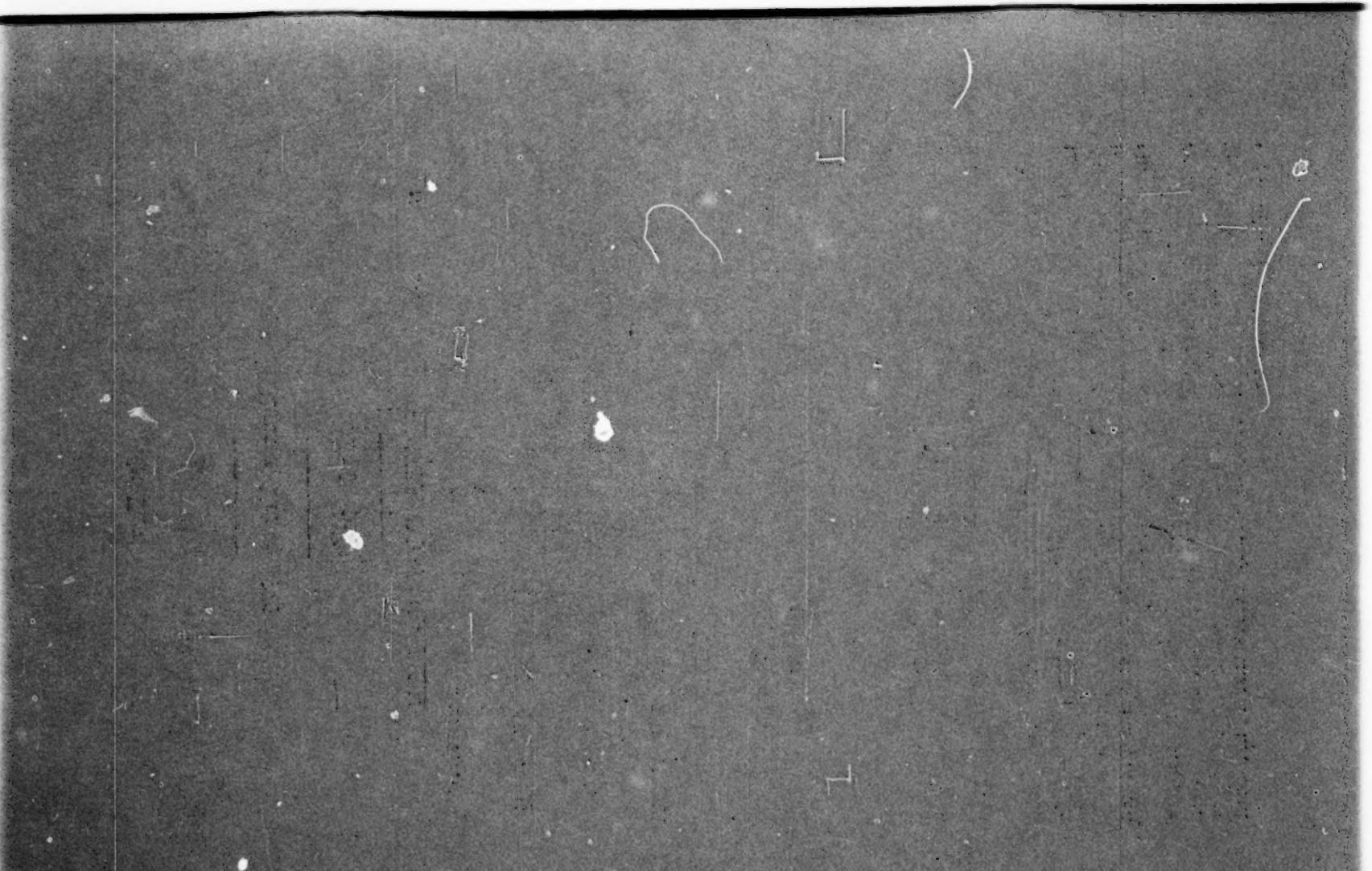

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STATEMENT

In their statement, respondents attack various alleged actions of cross-petitioner, Florida Power Corporation, and thereby seek to discredit it here.[1] Regardless of the factual

[1] They assert, for instance, that, back in 1927, Florida Power built lines into areas which could be served by Gainesville (Br. 3). In fact, however, the areas in question were rural at the time and there were *no existing power lines or facilities* there. The record herein is totally devoid of any instances in which Florida Power has duplicated existing power lines or services of Gainesville.

Respondents also score the efforts of Florida Power to compete against Gainesville's practice of duplicating its facilities and then obtaining customers by application of the water, sewer, and electricity "tie-in policy." Cross-petitioner vigorously denies that it has done anything illegal or unfair.

validity or invalidity of such allegations, respondents' attack misses the point at issue. The relevant point here is that the duplication of electric facilities now being engaged in by Gainesville is contrary to the public interest. Therefore, the public interest in this matter should be protected whether Florida Power has similarly acted in the past or not.

ARGUMENT

1. Respondents agree that competition between electric utilities can be beneficial to the public and that, indeed, it can be required by federal regulatory agencies. They then conclude that, "in situations where competition results in substantial net benefits to the consuming public," interconnection should not be denied simply because one of the competitors thereby obtains from the other the means for engaging in such competition (Br. 9). Such a conclusion might well inure if respondents' premises were factually correct under the circumstances in question here. This is not the case.

Florida Power has never urged, and it does not now urge, that *all* competition between electric utilities should be eliminated. Hence, the authorities cited in Gainesville's brief seeking to rebut such proposition are immaterial. It contends only that, under the particular circumstances of this case, Gainesville should not be granted an interconnection with Florida Power *without* regard for the competitive situation. This is so for two reasons.

First, although there may be instances in which competition between electric systems provides benefits to the public, the present case is not such an instance. Thus, it has never been disputed that Gainesville's practice of duplicating and paralleling existing lines and facilities is contrary to the public interest.

All of the parties, including the City of Gainesville, acknowledged at trial that such practices were adverse to the public interest. The Presiding Examiner flatly found Gainesville's duplication to be an "uneconomic and wasteful practice" that is "contrary to the public interest . . . ." (A. 58a). He further found that "*issuance of an unqualified order by the Commission directing the interconnection will inevitably result in further uneconomic duplication of facilities, a situation long recognized as inimical to the public interest.*" (A. 59a, emphasis supplied.) These findings are *unreversed and uncontradicted.* Indeed, the full Power Commission expressly declared its hope that Gainesville would voluntarily eliminate the practices in question.

Second, once Florida Power interconnects with Gainesville as ordered by the Federal Commission, thereby providing it with the substantial benefits of Florida Power's facilities, Florida Power will no longer be able to compete with Gainesville at the retail level.[2] As the Presiding Examiner stated in an unreversed finding, an unqualified order of interconnection puts Florida Power "in the anomalous position where it will be furnishing the means for Gainesville to compete against it more effectively . . ." (A. 59a-60a).

Respondents cite various common carrier decisions of this Court for the proposition that a regulated company may not refuse to serve a competitor simply because it is a competitor. (Br. 10). However, such a proposition is inapplicable here. Florida Power did *not* ask the Commission to deny an interconnection here simply because

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[2] Contrary to respondents' implication, only *retail* service was in direct issue herein insofar as the territorial controversy was concerned. Florida Power simply sought some assurance that it would remain as a *retail* supplier in some of the areas in which it had had facilities for so long. It never requested the Commission to prevent Gainesville from competing for wholesale customers.

Gainesville is a competitor. Florida Power never refused to interconnect with Gainesville. Instead, Florida Power at all times agreed to interconnect with Gainesville. It simply sought a measure of protection against the adverse economic effects that will admittedly inure to it as a direct result of an interconnection with Gainesville.

Under the particular circumstances of this case, it is respectfully submitted that the Federal Power Commission should have taken affirmative steps to protect the public and Florida Power from increased adverse effects flowing from its order of interconnection rather than to merely "urge" Gainesville to cease the practices in question. Such action by the Commission does *not,* as stated by respondents Gainesville, require denial of interconnection. The regulatory powers of the Federal Power Commission are sufficiently comprehensive to assure and to require *both.*

2. Respondents also assert that the policy of the State of Florida prohibits the establishment of service areas for municipally-owned utilities. This is a gross misrepresentation and not at all true.

It is first asserted by respondents that the Florida Commission "does not have authority to limit the areas served by a municipally-owned utility such as Gainesville . . ." (Br. 7, fn. 4). The Florida Commission cannot *in the first instance* force a municipal utility to establish service areas but *once* a municipal utility and regulated utility voluntarily reach agreement on service areas, the Florida Commission can and must pass upon the proposal before it has any efficacy. As early as 1957, the Florida Commission entered an order approving a proposed territorial agreement between the City of Orlando and Florida Power. Order No. 2595. Since that time, the Commission has entered a number of orders establishing service areas between municipal

and private systems. In *Storey v. Mayo,* 217 So. 2d 304 (Fla. 1968), the Florida Supreme Court reviewed and affirmed such an order of the Florida Public Service Commission.

Second, respondents contend that the policy of the Florida Legislature prohibits establishment of service areas for municipal utilities since recent bills to provide for exclusive service territories have not passed. The bills referred to related to other matters as well, and no such conclusion can be drawn from their failure to pass.

Further, as noted above, the Commission has long construed the pertinent Florida Statutes[3] as authorizing it to enter official orders establishing territorial service areas between municipal power systems and privately owned power systems, if the municipal system voluntarily agrees to such service areas prior to submission of the agreement to the Commission. The Commission's construction has been approved by the Florida Supreme Court. Under the law of Florida, when a statute has been construed in one way by a Court or an administrative body and the Legislature thereafter leaves the statute unchanged, that construction is deemed correct and engrafted to the statute. *Advisory Opinion to the Governor,* 96 So. 2d 541 (Fla. 1957); *Grimes v. State,* 64 So. 2d 920 (Fla. 1953); *Depfer v. Walker,* 169 So. 660 (Fla. 1936).

The Legislature, of course, has met numerous times since the Supreme Court first passed upon the power of the Florida Commission to establish service areas. *City Gas Co. v. Peoples Gas System, Inc.,* 182 So. 2d 429 (Fla. 1965). The decision in that case enunciates the power of the Commission to enter territorial orders as to regulated utilities without statement of any limitation. The Legislature has

[3] (Ch. 366).

also convened frequently since the Commission first entered territorial orders as to municipal power systems agreeing to respect the service areas thereby established. The Legislature, however, has taken no action to alter these constructions of Chapter 366. It has re-enacted that law as so construed. Thus, it is clear that the Commission regulation of *public utilities* by territorial order is fully effectual even when municipalities are involved.

CONCLUSION

The instant case constitutes the first time that this Court has had an opportunity to review a Federal Power Commission order requiring two utility systems to interconnect their facilities. The terms and conditions of such an interconnection order establish a new precedent of general interest and application. It is respectfully submitted that, if this Court grants certiorari to consider some of these terms, it should consider the entire order in context. For the foregoing reasons, the conditional cross-petition should be granted.

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